SUPREME COURT, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OF AMERICA

OCTOBER TERM, 1974

No: 74-593

RICHARD NEIL MYERS, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION OF RICHARD NEIL MYERS FOR WRIT OF CERTIORARI

Buddy W. Gregory
Attorney for Petitioner
Richard Neil Myers
508 Central Nat'l. Bank Bldg.
Houston, Texas 77002

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TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW Richard Neil Myers, Petitioner, and prays that a writ of certiorari issue to review the Judgment of The United States Court of Appeals For The Fifth Circuit reversing the judgment of the United States District Court, Southern District of Texas, Houston Division and denying his, petition for rehearing and petition for rehearing en banc in said Court.

REPORTS OF THE OPINIONS BELOW:

The order of the United States District Court, Southern District of Texas in cause number 73-H-376 dated and entered the 4th day of January, 1974, is reported in 369 F. Supp. 594. The opinion of The United States Court of Appeals Fifth Circuit in cause number 74-1265 Summary Calendar reversing the trial Court, dated and entered August 5, 1974, is reported in 497 F2d 1369. The opinion of The United States Court of Appeals Fifth Circuit in cause number 74-1265 denying the petition of Richard Neil Myers for rehearing and his petition for rehearing en banc, dated and entered October 17, 1974, is not yet reported. A copy of the Memorandum and Order and the Order of the United States District Court For the Southern District of Texas, Houston Division is found in the Appendix hereto pages A-1 through A-5.

A copy of the opinion of the United States Court of Appeals, Fifth Circuit dated August 5, 1974, reversing the trial Court is found in the Appendix hereto, pages A-6 through A-14.

A copy of the Judgment of the Fifth Circuit dated August 5, 1974 is found in Appendix page A-15.

A copy of the letter from the Clerk of the United States Court of Appeals Fifth Circuit indicating the petition of Richard Neil Myers for rehearing and the petition for rehearing en banc was denied is found in the Appendix hereto page A-16.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction is confered on this court by Rule 19 of the Supreme Court Rules wherein it is stated that if a lower Federal Court has decided a Federal question in a way in conflict with applicable decisions of this Court; further, the jurisdiction is confered when an important question of Federal Law

which has not been but should be settled by this court comes before it. The Fifth Circuit held contrary to previous decisions of the Supreme Court when they, by construction, applied Criminal Sanctions to an Administrative and Civil Statute and this has been held strictly beyond the jurisdiction of courts by the Supreme Court. Further the Supreme Court should pass upon this question and settle once and for all whether the saving statute 5 U.S.C. 907(a) confers upon the suceeding department or agency criminal protection as well as civil authority that the previous department or agency enjoyed.

The Federal Court, Southern District of Texas, Houston Division on January 4, 1974, dismissed the Criminal Indictment against the defendant Richard Neil Myers. The United States Court of Appeals Fifth Circuit in Cause No. 74-1265 Summary Calendar in an Order dated and entered August 5, 1974, reversed the ruling of the Federal Court in Houston. The United States Court of Appeals Fifth Circuit in cause no. 74-1265 in an order dated and entered October 17, 1974, denied the petition for rehearing and petition for en banc of Richard Neil Myers with respect to its judgment of August 5, 1974.

QUESTIONS PRESENTED FOR REVIEW

A. Can an indictment stand, charging assault on "A SPECIAL AGENT OF THE DRUG ENFORCEMENT ADMINISTRATION, UNITED STATES DEPARTMENT OF JUSTICE" when the applicable United States Statute clearly states that it is an offense to assault "any officer or employee of the Bureau of Narcotics and Dangerous Drugs."?

B. Would Article 907(a) of Title 5 of the United States Code and language set forth in a regulation of the Acting Administrator of the Drug Enforcement Administration found in 38 Fed. Reg. 1838 permit such an indictment to stand?

C. Would the failure of a Court to dismiss such an indictment constitute deprivation of the rights of Richard Neil Myers without due process of law prohibited by the Fifth Amendment of the Constitution of the United States of America?

D. Would permitting the indictment set out above to stand be contrary to the provisions of Article I, Section 9 of the Constitution of The United States of America which stands in part that: "No Bill of

Attainder or ex post facto Law shall be passed."?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATION THE CASE INVOLVES

Title 18 U.S.C. Section 111 provides in full as follows:

"Assaulting, resisting or impeding certain officers or employees

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or account of the performance of his official duties shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18 U.S.C. Section 1114 provides in full as follows:

"Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the secret service or of the Bureau of Narcotics and Dangerous Drugs, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or of the Department of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in,

the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education and Welfare or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title."

Title 5, Section 907(a), United States Code provides in part as follows:

"A statute enacted, and a regulation or other action made, prescribed, issued, granted, or performed in respect of or by an agency or function affected by a reorganization under this chapter, before the effective date of the reorganization, has, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law or by the abolition of a function, the same effect as if the reorganization had not been made. However, if the statute, regulation, or other action has vested the functions in the agency from which it is removed under the reorganization plan, the function insofar as it is to be exercised after the plan becomes effective, shall be deemed as vested in the agency under which the function is placed by the plan."

Reorganization Plan No. 2 of 1973, 1973 U.S. Code Cong. & Admin. News 3554 provides in part as follows: "Sec. 3. Abolition. The Bureau of Narcotics and Dangerous Drugs, including the Office of Director thereof is hereby abolished, and Section 3(a) of Reorganization Plan No. 1 of 1968 is hereby repealed. The Attorney General shall make such provision as he may deem necessary with respect to terminating those affairs of the Bureau of Narcotics and Dangerous Drugs not otherwise provided for in this Reorganization Plan."

Article I, Section 9, of the U.S. Constitution
Fifth Amendment of the U.S. Constitution

STATEMENT OF THE CASE:

Richard Neil Myers, one of the Defendants in this cause was charged by indictment with assaulting, "Robert Surovec a Special Agent of the Drug Endorcement Administration, United States Department of Justice . . . ", on or about the 27th day of August, 1973. The indictment alleges a violation of 18 U.S.C. 111. The defendant, Richard Neil Myers moved to dismiss the indictment for failure to charge an offense on the grounds that agents of the Drug Enforcement Administration are encompassed in 18 U.S.C. 111, because Section 111 refers to assaults against any person designated in Section 1114 and Section 1114 does not mention Special Agents of the Drug Enforcement Administration. On January 4, 1974, Judge James Nole of the Southern District of Texas, Houston Division, granted the motion of the defendants and dismissed the indictments against each defendant including the indictment against Defendant Richard Neil Myers. The United States has brought this Appeal from the Order of Dismissal.

The jurisdiction of the Federal District Court in Houston is based upon the fact that the offense charged is against a United States Official for which Sanctions have been inacted if binding on this defendant that would confer jurisdiction upon the court.

On November 6, 1973, Richard Neil Myers filed his MOTION TO QUASH THE INDICTMENT FOR FAILURE TO CHARGE AN OFFENSE.

By order dated and filed January 4, 1974, the indictment involving Richard Neil Myers and the three other defendants therein charged, was dismissed by the Honorable James Noel, Judge of the United States District Court for the Southern District of Texas, Houston Division.

From this ruling the United States of America appealed to the United States Court of Appeals for the Fifth Circuit. By judgment dated and entered August 5, 1974, The United States Court of Appeals, Fifth Circuit reversed the order of the Honorable Judge James Noel dated January 4, 1974. On the 27th day of August, 1974, Richard Neil Myers filed his Petition For Rehearing and Petition For Rehearing En Banc in the United States Court of Appeals, Fifth Circuit. On October 17, 1974, the United States Court of Appeals, Fifth Circuit entered its order denying the Petition for Rehearing and the Petition for Rehearing En Banc filed by Richard Neil Myers.

On October 24, 1974, Richard Neil Myers filed his Petition of Richard Neil Myers For Stay Of the Mandate of The United States Court of Appeals For the Fifth Circuit in cause number 74-1265.

On October 30, 1974, by order dated and filed on that date The United States Court of Appeals For the Fifth Circuit ordered the issuance of the mandate of said Court stayed to and including the 16th day of November, 1974.

ARGUMENT:

The issue in this case is whether, by construction, the statute may be read to cover the facts in the instant case. Should there be judicial creation of crimes by construction or interpretation of a statute? We think not. The dangers are too grave and those very dangers are basis of the ancient maxim that criminal statutes should be strictly construed. In the words of Chief Justice Marshall:

> "The intention of the legislature is to be collected from the words they employed. Where there is no ambiguity in the words, there is no room for construction, "*United States vs. Wiltberger*, 5 Wheat 76, 95.

Some indication of the importance of the precise language of the statute to decision in a case like this can be gleaned from "*Bennett v. United States*, 285 F. 567, Fifth Circuit 1961." There, the question was whether officers of the Border Patrol were to be included within the statute. Section 1114 makes no explicit reference to the border patrol. It does, however, contain the language, "Any immigration officer," language amply sufficient to described Border Patrol Officers without ambiguity. Accordingly the statute applied. We point out there is no language in the statute reading "any narcotics officer". If Congress had intended such a broad protection to be included in the statute we can certainly presume it knew how to say so.

In fact, the Department of Justice has repeatedly told the Congress precisely how to say so, the statute was first enacted in the 73rd Congress, 1934; it indicated in report number 535, Senate reports on public bills, 73 Congress 2nd Session, containing the letter of the Honorable Homer Cummings,

Attorney General of the United States, to the chairman of the Senate Committee on the Judiciary recommending the enactment of a "broad, general statute", covering assaults, etc. upon "any officer or employee of the United States." The senate voted its approval of just such legislation, but the House did not, supporting instead more restrictive statutes specifically designating the officers to whom it applied. The Conference committee report, report number 1593, 73rd Congress, 2nd session, indicates the acquisence of the Senate in the House version. The broad statute suggested and supported by Attorney General Cummings was never enacted. The specific and narrowly drawn act, which with subsequent amendments, survives as 18 U.S.C. 1114, was enacted instead. What the government now seeks, is the transmutation by this court of that statute into just such an act as was rejected by the Congress.

The point of the foregoing discussion is to signify that even if the language of the act would be considered ambiguous, the legislative history of the act eliminates whatsoever any ambiguity. The statute is clear, precise and unambiguous. It does not encompass the instant case.

The government attempts to find some comfort in the provisions of 5 U.S.C. 907(a) governing the functional continuity of federal agencies reorganized without specific congressional authority under reorganization plans pursuant to 5 U.S.C. 906. Section 907(a) nowhere provides punishment for any individual who trangresses its mandate. In order to determine the scope of a Criminal Statute we must look to the Criminal Statute, not to an administrative housekeeping provision which was never intended to define crime. It is entirely accurate to refer to section 907(a) as a saving statute, but the government would have it save something that was never there to be saved. The history of Section 1114 again demonstrates that is not what the Congress had in mind at all. When the name of the United States Post Office Department was changed to the United States Postal Service, Section 1114 was altered by explicit amendment, not by reliance on some saving statute. And, when the Bureau of Narcotics and Dangerous Drugs was created in the Department of Justice to assume the functions of the former Bureau of Narcotics in the Treasury Department, Section 1114 was amended explicity;

no such amendment has been made as the result of the creation of the Drug Enforcement Administration. It is in this connection that a review of *United States v. Hasimar*, Opinion set out in the appendix, is pertinent, in Judge Bonsal's memorandum opinion. That opinion released on May 23, 1970, held that agents of the Bureau of Narcotics and Dangerous Drugs were not covered under the statute in its then existing form which designated agents of the Treasury Bureau of Narcotics. Indictment was dismissed and the defendants in that case were freed subject to the provisions of state law. The government in that case promptly took appeal to the Court of Appeals for the 2nd Circuit. While the appeal was pending, Congress amended the statute and explicitly listed agents of the Bureau of Narcotics and Dangerous Drugs. The government, however, did not pursue, the particular defendants involved or the particular crime it had attempted to describe in that indictment. Instead, on the government's motion, its appeal was dismissed as moot. In actuality the appeal was not moot. If Judge Bonsal's decision had been reversed by the Second Circuit, defendants would have been called upon to answer at the bar of the District Court for the charges against them. One does not judge mootness by the condition of general law, but rather by the impact of intervening circumstances on the parties of a particular law suit. What emerges is the recognition even by the Department of Justice that there was no benefit to be gained in the appeal of Hasimar. The Department of Justice itself recognized the view of the law for which we contend here.

Congress has demonstrated its ability in instance after instance to speedily correct any defect in a statute as this one and it is up to Congress to afford the specific Federal protection the government believes is necessary.

There is a principal at stake in this case which is of paramount importance. The principal, whether it be expressed in terms of statutory construction of the ex post facto clause of Article 1, Sec. 8 of the Constitution of the United States, or in terms of the due process clause of the Fifth Amendment of the same document, holds it contrary to the entire constitutional history of the republic to punish for crimes which have not been specifically designated by the Congress prior to their commission. The import of that principal has been recognized

in the uniform force of Supreme Court decision beginning with the case for criminal liable of newspaper editor because he said nasty things about Thomas Jefferson, *United States v. Hudson and Goodwin,* 7 Cranch 32, to more recent decisions involving lunch counter sit-ins, *Bouie v Columbia,* 378 U.S. 347 and Travel to Cuba without a validated passport, *United States v. Laub,* 385 U.S. 475. Setting his face against the definition of crime by judicial fiat Chief Justice Marshall held in, *Hudson and Goodwin,* that the courts in the United States are without jurisdiction over common law crimes. He said:

> "The legislative authority of the Union must first make an act a crime, fix a punishment to it, and declare the court that shall have jurisdiction of the offense." *The United States v. Hudson and Goodwin,* 37 Cranch 32, 34.

The great Chief Justice carried his logic further in the *United States v. Wiltberger* 5, Wheat 76-96:

> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principal, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of like character, with those which are enumeratd."

In 1819, the Supreme Court, *United States v. Chase* 135 U.S. 255, confined a criminal obsenity statute within its letter quoting Ashurst, J. in *Jones v. Smart,* 1 T.R. 51:

> "It is safer to adopt what the legislatures have said than to suppose what they meant to say."

In *Fasulo v. United States* 272 U.S. 620 the Court states the principal this way:

> "There are no constructive offenses, before one can be punished, it must be shown that it is a case plainly within the statue", 272 U.S. 620, 629.

In the *United States v. Resnick,* 299 U.S. 207, Federal Regulations enforceable by criminal sanctions regarding the status for specific sized tin cans used to contain fruits and vegetables can not be extended to tin cans of different size. In a case particularly applicable to this court, the court held in *Pierce v. United States,* 314 U.S. 366, that a statute prescribing the false

impersonation of government officials did not criminalize the impersonation of an official of the Tennessee Valley Authority because TVA was a government corporation and the statute did not prescribe impersonation of an official of a government corporation. The defendants conduct, while it may be reprehensible, it is not defined in the statute.

In the *United States v. Laub,* 87 Supreme Court 574, 1967, an attempt was made to prosecute persons traveling in restricted areas without proper passport authorization. The Supreme Court of the United States in affirming the District Court's Dismissal of the Indictment held:

> "We agree with the District Court that the indictment herein does not allege a crime. If there is a gap on law, the right and the duty, if any to fill it did not fall upon the courts . . . Crimes are not to be created by inference. They may not be constructed nunc pro tunc." Opinion at page 581.

And in *Bouie v. Columbia* 384 U.S. 347, even a state as opposed to federal, prosecution was struck down for the same reason. The state statute whose meaning had been expanded by the supreme court of the state could not support prosecution upon the expanded theory.

All of these cases indicate the care with which the courts of our land must resist easy blandisments of the prosecutors to punish reprehensible conduct in the absence of unequevocable and precise language of the Congress to finding such conduct as a crime. As we have noted, this cause, this elemental notion in our jurisprudence is sometimes phrased in terms of the rule of Congress, courts will choose the alternative of leniency. *Ladner v. United States,* 358, U.N. 169, 178. More frequently, it is viewed as an element of due process. Sometimes, as in *Laub and Bouie,* with its citation to *Calder v. Bull,* 3 Dall, 386, there is a gloss of ex post facto clause operative in the decisional process. Whatever the rationale we think that the principal clearly emerges and is worthy of application by this court in the instant case.

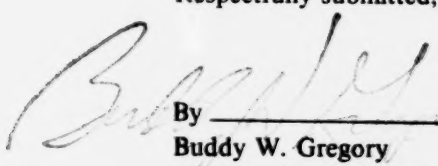
The Supreme Court has dealt with things like manslaughter, *(Wiltberger)* extortion *(Fasulo)* obsenity *(Chase)* impure foods *(Resnick)* a politically inspired lying *(Hudson and Goodwin).* If public opinion in the era of the Alien and Sedition laws could be expected to react strongly against sexual lies

about Thomas Jefferson the era of Comstock could be expected to produce an equal reaction against the obsenity involved in the *Chase* case, the era of prohibition against the extortion involved in *Fasulo,* and the era of cold war and missile crimes against the charges involved in *Laub.* Preserving the principles of the constitution is of paramount importance. For the reasons set forth above we respectfully pray that this court uphold the judgment of the District Court in Houston dismissing the indictment and reverse that of the Fifth Circuit.

CONCLUSION

For the reasons set herein the petition for Writ of Certiorari should be in all things granted and a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



By _____
Buddy W. Gregory
Attorney for Petitioner
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Houston, Texas 77002

CERTIFICATE OF SERVICE

I, Buddy W. Gregory, Attorney for the Petitioner Richard Neil Myers, certify that all parties required to be served have been served and I hereby certify that I have served the foregoing petition for Writ of Certiorari for the petitioner Richard Neil Myers upon the respondent by mailing three copies each postage prepaid and air mail where addressed to Washington, D.C. this the 14th day of November, 1974 to counsel for the various parties listed below, and to counsel for the Respondent listed below as follows in appliance with Title 28, United States Code, Rule 33, Paragraphs I and II of the Supreme Court in the United States of America:

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Solicitor General
United States of America
Department of Justice
Washington, D.C. 20530

By _____
Buddy W. Gregory

The Clerk will enter my appearance as counsel for the petition Richard Neil Myers.

By _____
Buddy W. Gregory

The Clerk is requested to notify counsel of action of the court by means of air mail letter.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA	]	
v.	]	Criminal No. 73-H-376
KEITH STANFORD IRICK	]	
DAVID PAUL KAY	]	
RICHARD NEIL MYERS	]	
JOSEPH EDWIN PEEL	]	

MEMORANDUM AND ORDER

In this criminal prosecution under 18 U.S.C. §111, each defendant moves to dismiss the indictment for failure to charge an offense. FED. R. CRIM. P. 12(a). The indictment charges defendants "did forcibly assault, resist, oppose, impede, intimidate, and interfere with . . . a Special Agent of the Drug Enforcement Administration, United States Department of Justice." Section 111 of Title 18 prohibits such conduct when directed toward any person designated in 18 U.S.C. §1114. Section 1114 lists numerous groups of federal employees and officers including "any officer or employee . . . of the Bureau of Narcotics and Dangerous Drugs." Section 1114 does not name special agents of the Drug Enforcement Administration.

Defendants contend the indictment must be dismissed because it does not charge a crime proscribed by Sections 111 and 1114. Because defendants' position is valid, the motion to dismiss must be granted. Defendants also contend that any such statutory construction and application in this case would be unconstitutional. Having disposed of the case on the defendants' first ground of attack, it is not necessary to reach the constitutional question.

The Bureau of Narcotics and Dangerous Drugs was abolished and the Drug Enforcement Administration was established by Reorganization Plan No. 2 of 1973. 1973 U.S. Code Cong. & Admin. News 912 (March 28, 1973). It became effective July 1, 1973 without Congressional action, 5 U.S.C. §906. On July 10, 1973, pursuant to Executive Order 11727, July 6, 1973, the Attorney General transferred the function of the Bureau of Narcotics and Dangerous Drugs to the Drug

Enforcement Administration by amending the Code of Federal Regulations. 28 Fed. Reg. 18380 (1973). Thus, the Drug Enforcement Administration, its officers and employees, are the successors to the Bureau of Narcotics and Dangerous Drugs, its officers and employees in function and authority.

Nevertheless, the Congress has not yet amended § 1114 of Title 18 to reflect this change. Consequently on August 27, 1973 when the incident made the basis of this indictment took place, Sections 111 and 1114 proscribed assaults against Bureau of Narcotics and Dangerous Drugs agents but not against Drug Enforcement Administration agents. The question posed by this case is whether 18 U.S.C. §§ 111, 1114 may be constitutionally construed to apply to employees of a new federal agency which replaces an enumerated agency. The alternative to such construction is the requirement of congressional action before this inclusion can occur.

Both statutory history and a plain reading of Section 1114 demonstrate congressional intent to enact a limited, specific statute. The Senate version of the original bill covered " . . . . any official or employee of the United States." S.R. 535, 73rd Cong., 2nd Sess. (1934). The final statute, however, specifically named the officials and employees covered. H.R. 1593, 73rd Cong., 2nd Sess. (1934). By subsequent amendment, other groups of federal employees were added.

The statute remains very specific and explicit. The particular groups of federal officials and employees to be covered are enumerated. In some cases, the statute includes all employees of a particular agency, e.g., the secret service. In other cases all federal officials performing a particular function are covered, e.g., any immigration officer, *Bennett* v. *United States*, 285 F.2d 567 (5th Cir. 1960). In many instances, only those employees of named departments who perform particular functions are mentioned, e.g., any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration.

The obvious purpose of the statute is to provide the protection of the federal courts to those certain officers. *United States v. Langione*, 445 F.2d 636, 637 (1st Cir. 1971). Nevertheless, it is clearly not meant to sweep in every inter-

ference with any federal official. ***United States v. Johnson,*** 462 F.2d 423, 428 (3rd Cir. 1972).

More importantly in this instance, the statute does not purport to cover successor agencies to those enumerated. Instead, the Congress has regularly amended the statute to reflect changes in agency organization and nomenclature. In 1970, for example, the statute was altered to reflect changes from the Bureau of Narcotics to the Bureau of Narcotics and Dangerous Drugs. This regular amendment, rather than inclusion in the statute of the words, "successor agencies or officials" or words of like effect, evidence a congressional intention that legislative amendment rather than judicial construction is meant to be the proper means of updating the statute. See ***Pierce v. United States,*** 314 U.S. 306 (1941).

A narrow, literal reading of the statute is consistent with general principles of criminal law. See CLARK & MARSHALL, LAW OF CRIMES §1.07 (7th ed. 1967); 21 AM. JUR. 2nd, ***Criminal Law*** §17 (1965); 22 C.J.S., ***Criminal Law*** §17 (1961). The maxim, expressio unius est exclusio alterius (expression of one thing implies exclusion of another) is appropriate here. A court should not depart from the plain meaning of the statutory language. ***United States v. Wiltberger,*** 18 U.S. (5 Wheat.) 76, 96 (1820). Also relevant is the principle that penal sanctions are to be strictly construed. ***United States v. Standard Oil Company,*** 384 U.S. 224, 255 (1966). The definition of criminal conduct is a legislative rather than judicial function, and the Courts should be reticent to broadly read criminal statutes. ***United States v. Keboe,*** Crim. No. 73–H–213 (S.D. Texas Nov. 8, 1973).

The judicial construction and application of Section 1114 urged by the government raises serious constitutional questions which are not required to be answered.[1] Statutes are to be construed so as to avoid a danger of unconstitutionality. ***United States v. Harriss,*** 347 U.S. 612, 619 (1954).

The Court concludes that Section 1114 of Title 18 applies only to those departments, agencies, and bureaus specifically named therein. It cannot be construed to apply to employees not named by the statute. This is true even if the group in question is successor to employees named by the statute. Accordingly, the Court holds that 18 U.S.C. §§111, 1114 do not prohibit the conduct alleged in the indictment. Unless and until the Congress acts, the government must rely on the

state penal system to protect special agents of the Drug Enforcement Administration.

In the instant case, the defendants' Motions must be GRANTED, and the indictment dismissed.

The Clerk shall file this Memorandum and Order and send copies to all counsel.

DONE at Houston, Texas, this 4th day of January, 1974.

SIGNED: James Noel
Judge

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1. The same result may be constitutionally required. The common law requirement of statutory definiteness and specificity is so fundamental as to be required by due process. *Conally v. General Construction Co.*, 269 U.S. 285 (1926). Judicial construction enlarging a plainly written statute to include conduct not obviously described by the statute is constitutionally impermissible. *Pierce v. United States*, 314 U.S. 306 (1941). Furthermore, application of new judicial interpretations to pending criminal cases challenges the prohibition of ex post facto law. U.S. Const. art. I, §10; *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Talavera v. Wainwright*, 468 F.2d 1013 (5th Cir. 1972).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	]	
v.	]	Criminal No. 73-H-376
KEITH STANFORD IRICK	]	
DAVID PAUL KAY	]	
RICHARD NEIL MYERS	]	
JOSEPH EDWIN PEEL	]	

ORDER

On this day came on to be heard the Motions of each defendant to Dismiss the Indictment for Failure to Charge an Offense; and the Court, having considered each motion along with the government's response in opposition thereto, has concluded, for reasons expressed in the Memorandum and Order of even date, that each motion must be GRANTED; accordingly,

It is hereby ORDERED and ADJUDGED that this indictment and cause be DISMISSED in all respects as to each and every defendant.

The Clerk shall file this Order and send a copy to each defendant and to counsel for the government.

DONE at Houston, Texas, this 4th day of January, 1974.

Signed: James Noel
Judge

UNITED STATES of America, Plaintiff-Appellant,

v.

Keith Stanford IRICK et al., Defendants-Appellees.

No. 74–1265
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Aug. 5, 1974.

Accused filed motions to dismiss indictment charging them with assault of an officer of the Drug Enforcement Administration. The United States District Court for the Southern District of Texas, James L. Noel, Jr., J., 369 F.Supp. 594, granted the motions and the Government appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that under statute providing for continuity of status and function in connection with executive reorganizations, special agents of Drug Enforcement Administration were within ambit of statutes prohibiting assaults against officers of Bureau of Narcotics and Dangerous Drugs.

Reversed.

1. Assualt and Battery ⇐ 48
Obstructing Justice ⇐ 7

Under statute providing for continuity of status and function in connection with executive reorganizations, officers of Drug Enforcement Administration, which was successor to Bureau of Narcotics and Dangerous Drugs, were within ambit of statutes prohibiting assaults against officers of the Bureau, even though statutes did not specifically refer to the Drug Enforcement Administration. 5 U.S.C.A. §§ 906(a), 907(a); 18 U.S.C.A. §§ 111, 1114.

2. Drugs and Narcotics ⇐45

Fact that Congress had previously amended statute pertaining to protection of federal officers and employees to reflect changes caused by reorganization and had substituted therein the Bureau of Narcotics and Dangerous Drugs for its predecessor did not establish that amendment was necessary to coverage of agents of the Bureau or that the statute was inapplicable to officers of Drug Enforcement Administration, which was the successor to the Bureau, due to absence of specific reference to the Drug Enforcement Administration. 5 U.S.C.A. §§ 906(a), 907(a); 18 U.S.C.A. §§ 111, 1114; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 506, 508, 509, 21 U.S.C.A. §§ 876, 878, 879.

3. Drugs and Narcotics ⇐43

There was no constitutional impediment to inclusion of officers and agents of Drug Enforcement Administration within coverage of statute which pertained to protection of certain federal officers and employees and which referred to the Bureau of Narcotics and Dangerous Drugs, which was the Drug Enforcement Administration's predecessor, even though the statute did not specifically refer to the Drug Enforcement Administration. 5 U.S.C.A. §§ 906(a), 907(a); 18 U.S.C.A. §§ 111, 1114.

4. Assault and Battery ⇐48
Obstructing Justice ⇐7

It is not an element of offense of assaulting, resisting or impeding certain federal officers or employees that person who commits one of the proscribed acts does so with knowledge that his victim is a federal officer or that he knows the specific name of the agency by which victim is employed. 18 U.S.C.A. §§ 111, 1114.

5. Criminal Law ⇐13.1(1)

Persons accused of a crime must be afforded fair warning of prohibited conduct by statute which they are accused of violating.

6. Criminal Law ⇐13(1)

Statute providing for continuity of status and function in

connection with executive reorganizations is applicable to criminal as well as to civil statutes. 5 U.S.C.A. § 907(a).

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

The question presented for decision is whether an indictment charging assault of an officer of the Drug Enforcement Administration is fatally defective because the pertinent statutes, though they encompass assaults on "any officer or employee of the Bureau of Narcotics and Dangerous Drugs," do not specifically refer to the Drug Enforcement Administration, the successor in the Department of Justice to the Bureau of Narcotics and Dangerous Drugs.

Defendants Keith Stanford Irick, David Paul Kay, Richard Neil Myers, and Joseph Edwin Peel were named in an indictment which charged that on or about August 27, 1973, they "wilfully and by use of a deadly and dangerous weapon, that is, a bayonet, did forcibly assault, resist, oppose, impede, intimidate, and interfere with . . . a Special Agent of the Drug Enforcement Administration, United States Department of Justice while [he] was engaged in the performance of his official duties." The indictment charged violation of 18 U.S.C. §§ 111 and 2.[1]

Section 111 of Title 18, United States Code, prohibits, ***inter alia***, the forcible assault, intimidation, or interference with "any person designated in [18 U.S.C. § 1114] while engaged in or on account of the performance of his official duties . . ."[2] Section 1114 designates several categories of federal officers and employees. Among the categories designated is the Bureau of Narcotics and Dangerous Drugs, the predecessor in the Department of Justice of the Drug Enforcement Administration.[3]

The Bureau of Narcotics and Dangerous Drugs was established by Reorganization Plan No. 2 of 1973. 1973 U.S. Code Cong. & Admin.News 3554. The plan became effec-

tive without congressional action on July 1, 1973, as provided by 5 U.S.C. § 906(a); and on July 10, 1973, pursuant to Executive Order 11727, dated July 6, 1973, the Attorney General transferred the functions of the Bureau of Narcotics and Dangerous Drugs to the Drug Enforcement Administration by amending the Code of Federal Regulations, 38 Fed. Reg. 18380.[4] Thus, as the district court found, "the Drug Enforcement Administration, its officers and employees, are the successors to the Bureau of Narcotics and Dangerous Drugs, its officers and employees in function and authority." Section 1114, however, was not amended to reflect this changeover from the Bureau of Narcotics and Dangerous Drugs to the Drug Enforcement Administration.

In the court below, each of the defendants moved to dismiss the indictment for failure to charge an offense on the ground that agents of the Drug Enforcement Administration are not within the categories designated under 18 U.S.C. § 1114 and, thus, assaults on such agents are not encompassed by 18 U.S.C. § 111. Notwithstanding its finding that the Drug Enforcement Administration is the successor to the Bureau of Narcotics and Dangerous Drugs, the district court held that section 111 does not apply to assaults on Drug Enforcement Administration agents because Congress failed to amend section 1114 to substitute the Drug Enforcement Administration for the Bureau of Narcotics and Dangerous Drugs. Concluding that section 1114 "applies only to those departments, agencies, and bureaus specifically named therein," the court granted defendants' motions and ordered the indictment dismissed. The Government appeals pursuant to 18 U.S.C. § 3731.[5]

[1] The district court's memorandum and order concluding that the indictment should be dismissed omits reference to 5 U.S.C. § 907(a), enacted September 6, 1966.[6] Section 907(a), which provides for continuity of status and function in connection with executive reorganizations, controls the issues presented. It reads in full:

> § 907. Effect on other laws, pending legal proceedings, and unexpended appropriations.
>
> (a) *A statute enacted*, and a regulation or other action made, prescribed, issued, granted, or performed in respect of or by an agency or function affected by a

reorganization under this chapter, ***before the effective date of the reorganization, has except to the extent rescended, modified, superceded, or made inapplicable by or under authority of law or by the abolition of a function, the same effect as if the reorganization had not been made.*** However, if the statute, regulation, or other action has vested the functions in the agency from which it is removed under the reorganization plan, the function insofar as it is to be exercised after the plan becomes effective, shall be deemed as vested in the agency under which the function is placed by the plan.

(Emphasis added.)

The section's legislative history reflects the clear meaning of the statutory language, that is, the desire of Congress not to leave a hiatus in existing law when a reorganization has taken place. A House Report on the 1949 Reorganization Act, the predecessor of the 1966 reorganization statute, explains that section 907 "contains saving provisions with respect to the status, after a reorganization, of statutory provisions, regulations, and other actions, and suits and other proceedings, having a relation to any agency or function affected by such reorganization." H.R.Rep. No. 23, 82st Cong., 1st Sess., 1949 U.S.Code Cong.Serv. 1391. In addition, a House Report commenting on a similar saving clause in the original Reorganization Act of 1939 noted that the saving clause "provides for the survival of . . . laws in connection with reorganization." H.P.Rep. No. 120, 76th Cong., 1st Sess., 6 (1939).

Basically, when a reorganization takes place, section 907(a) continues in effect laws existing prior to the reorganization. Any statute relating to an agency and enacted before the effective date of the reorganization of that agency has the same effect as if there had been no reorganization. Thus, special agents of the Drug Enforcement Administration fall within the ambit of section 111, by virtue of the provisions of section 1114, in the same manner as did the special agents of the Bureau of Narcotics and Dangerous Drugs.

[2] On appeal, defendants pose four basic arguments as militating against the application of section 907(a) to their situation. First, they assert that Congress has at times amended 18 U.S.C. § 1114 to reflect changes caused by re-

organizations. They refer specifically to the amendment by Congress, as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of section 1114 to substitute the Bureau of Narcotics and Dangerous Drugs in the Department of Justice for its predecessor, the Bureau of Narcotics in the Treasury Department. 1970 U.S.Code Cong. & Admin. News 1492, § 701(i)(1), Pub.L. 91–513, 84 Stat.1236. We do not view this as evidence of congressional intent that an amendment of 18 U.S.C. § 1114 was a precondition to the coverage of agents of the Bureau of Narcotics and Dangerous Drugs, to the disregard of 5 U.S.C. § 907(a). No such implication can be garnered from the legislative history of the Act.[7] The provision amending section 1114 was merely one provision of a general statutory program designed to deal with drug abuse; and the amendment came almost two years after the creation of the Bureau of Narcotics and Dangerous Drugs, *see* Reorganization Plan No. 1 of 1968, 1968 U.S.Code Cong. & Admin. News 4734. The hearings on the creation of the Bureau of Narcotics and Dangerous Drugs, moreover, indicate that amendment of section 1114 was not deemed necessary to the continued coverage of that Bureau's officers. *See* Hearings Before a House Subcomm. on Government Operations, 90th Cong., 2d Sess., at 64 (1968).[8] Indeed, it would ignore the impact of 5 U.S.C. § 907(a) to hold that because Congress has on previous occasions made a conforming amendment to section 1114 it must do so to protect federal agents in reorganization situations.

[3, 4] Defendants also assert, in a vague way, that there is a constitutional impediment to the inclusion of Drug Enforcement officers and agents within the coverage of section 1114. We perceive no such problem. We note, moreover, that it is not an element of a section 111 offense that the person who commits one of the proscribed acts does so with the knowledge that his victim is a federal officer, *see e. g.*, United States v. Davis, 5 Cir., 1970, 423 F.2d 974, 975 n. 1, cert. denied, 400 U.S. 836, 91 S.Ct. 74, 27 L.Ed. 2d 69; United States v. Marcello, 5 Cir., 1970, 423 F.2d 993, 1010, cert. denied, 398 U.S. 959, 90 S.Ct. 2172, 26 L.Ed.2d 543; Burke v. United States, 5 Cir., 1968, 400 F.2d 866, 868, cert. denied, 395 U.S. 919, 89 S.Ct. 1771, 23 L.Ed.2d 237 (1969); United States v. Langone, 1 Cir., 1971, 445 F.2d 636, cert. denied, 404 U.S. 915, 92 S.Ct.

226, 30 L.Ed.2d 189; United States v. Goodwin, 3 Cir., 1971, 440 F.2d 1152, 1155; United States v. James, 9 Cir., 1972, 464 F.2d 1228, 1230, cert. denied, 409 U.S. 1086, 93 S.Ct. 697, 34 L.Ed.2d 123;[9] and it is certainly not an element of a section 111 offense that the defendant know the specific name of the agency by which his victim is employed. "[W]hat little legislative history does exist indicates only that Congress intended to create a federal forum for the enumerated offenses instead of having to rely upon state and local courts for the protection of federal officers." United States v. Goodwin, *supra*, 440 F.2d at 1155; *see* Ladner v. United States, 358 U.S. 169, 174 n. 3, 79 S.Ct. 209, 212 n. 3, 3 L.Ed.2d 199 (1958) (Letter of January 3, 1934, from Homer Cummings, Attorney General, to Senator Ashurst, Chairman of the Senate Committee on the Judiciary). *See also* United States v. Langone, *supra*, 445 F.2d at 637. Given the existence of 5 U.S.C. § 907(a) at the time of the occurrence of the assault in this case, as well as the fact that for conviction under section 111 a defendant need not have knowledge of the official status of his victim, no constitutional impediment can be claimed in the reorganization statute's application to these defendants.

[5] Defendants also place reliance on the doctrine that penal statues must be construed strictly and contend that a strict reading of section 1114 requires that it apply only to those agencies specifically named therein. The strict construction concept does not, however, require that other pertinent statutes, in this case section 907(a), be disregarded. Furthermore, the doctrine is grounded in the principle that persons accused of a crime must be afforded fair warning of the prohibited conduct. *See, e. g.*, United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954); W. La Fave & A. Scott, Jr., Criminal Law 72 (1972). It cannot be validly argued that defendants were not given adequate notice of the prohibited conduct, that is, the assault of a federal officer. Section 907(a) in no way changes the nature of this conduct.

[6] Finally, defendants argue that section 907(a) was intended to apply to civil statutes—not criminal statutes—and to the functions of governmental agencies in reorganizations. We can discern no such restriction of intent, either from the

plain meaning of the statute or from its legislative history.

We have considered all of defendants' assertions and find them to be without merit. We conclude that section 1114 includes the Drug Enforcement Administration in the same manner that it encompassed the Bureau of Narcotics and Dangerous Drugs. The indictment, therefore, as it charges an offense under section 111, is not defective.

Reversed.

FOOTNOTES

* Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. 18 U.S.C. § 2 provides:

   § 2. Principals

   (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

2. 18 U.S.C. § 111 reads in full:

   § 111. Assaulting, resisting, or impeding certain officers or employees

   Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

3. The pertinent text of 18 U.S.C. § 1114 provides:

   § 1114. Protection of officers and employees of the United States

   Whoever kills . . . any officer or employee . . . of the Bureau of Narcotics and Dangerous Drugs . . . while engaged in the performance of his official duties . . . shall be punished as provided under sections 1111 and 1112 of this title.

4. A regulation promulgated on July 1, 1973 by the Acting Administrator of the Drug Enforcement Administration used language similar to that of 5 U.S.C. § 907(a):

   All regulations or other action made, prescribed, issued, granted or performed in respect of or by the agencies or functions affected by section 1 of Reorganization Plan No. 2 of 1973 shall, until rescinded, modified, superseded, or made inapplicable, have the same effect as if the reorganization had not been made.

The directive further provides:

Sec. 3. *Enforcement officers*

(a) All criminal investigators . . . are authorized to exercise all of the powers of enforcement personnel granted by 21 U.S.C. 876, 878, 879 . . . .

38 Fed.Reg. 18381.

The special agent who the indictment charges defendants with assaulting is a criminal investigator within the purview of the regulations.

5. 18 U.S.C. § 3731 provides in relevant part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

6. The only other decision treating the question presented in this case is United States v. Hasimar, 69 Cr. 58 (S.D.N.Y. May 25, 1970) (unreported), which involved the establishment of the Bureau of Narcotics and Dangerous Drugs. The court in *Hasimar* disposed of the case in the same manner as the court below; and, like the court below, failed to mention 5 U.S.C. § 907(a).

7. The legislative history is silent on the purpose of the amendment. *See* 1970 U.S.Code Cong. & Admin.News 4566 ff.

8. In response to questions from Congressman Edwards, Phillip S. Hughes, Deputy Director, Bureau of the Budget, and John H. Finlator, Director, Bureau of Drug Abuse Control, Food and Drug Administration, Department of Health, Education and Welfare, testified that reorganization would not affect the coverage of employees of the Bureau of Narcotics and Dangerous Drugs under 18 U.S.C. § 1114.

9. Defendants do not challenge this principal of law.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1973

No. 74-1265
Summary Calendar

D. C. Docket No. CR-73-H-376

UNITED STATES OF AMERICA,
Plaintiff - Appellant,
versus
KEITH STANFORD IRICK, et al.,
Defendants - Appellees.

Appeal from the United States District Court for the
Southern District of Texas

Before BROWN, Chief Judge, and
THORNBERRY and AINSWORTH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

August 5, 1974

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

October 17, 1974

TO ALL COUNSEL OF RECORD

No. 74–1265 U.S.A. V. IRICK, ET AL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

Signed: By Anne G. Parent
Deputy Clerk

cc: Mr. F. Witcher McCullough, III
Mr. William L. Patton
Mr. James R. Gough
Mr. Philip S. Greene
Mr. Harry L. Tindall
Mr. Buddy W. Gregory
Mr. Edward L. Lasof

*As to Richard Neil Myers and Joseph Edwin Peel

73 CONGRESS
2d Session

SENATE

CALENDAR NO. 568
REPORT
No. 535

PROVIDE PUNISHMENT FOR KILLING OR ASSAULTING FEDERAL OFFICERS

Mar. 20 (calendar day, Mar. 22), 1934.-Ordered to be printed

Mr. Stephens, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2080]

The Committee on the Judiciary, having had under consideration the bill (S. 2080) to provide punishment for killing or assaulting Federal officers, reports the same favorably to the Senate and recommends that the bill do pass, with the following amendment:

On page 1, line 3, strike out the word "assassinate" and the commas preceding and following said word.

The purpose and need of this legislation are set out in the following letter from the Attorney General to the chairman of this committee.

DEPARTMENT OF JUSTICE
Washington, D.C., January 3, 1934.

Hon. HENRY F. ASHURST,
Chairman Committee on the Judiciary,
United States Senate, Washington, D.C.

MY DEAR SENATOR: I wish again to renew the recommendation of this Department that legislation be enacted making it a Federal offense forcibly to resist, impede, or interfere with, or to assault or kill, any official or employee of the United States while engaged in, or on account of, the performance of his official duties. Congress has already made

it a Federal offense to assault, resist, etc., officers or employees of the Bureau of Animal Industry of the Department of Agriculture while engaged in or on account of the execution of their duties (sec. 62, C.C.; sec. 118, title 18, U.S.C.); to assault, resist, etc., officers and others of the Customs and Internal Revenue, while engaged in the execution of their duties (sec. 65, C.C.; sec. 121, title 18, U.S.C.); to assault, resist, beat, wound, etc., any officer of the United States, or other person duly authorized, while serving or attempting to serve the process of any court of the United States (sec. 140, C.C.; sec. 245, title 18, U.S.C.); and to assault, resist, etc., immigration officials or employees while engaged in the performance of their duties (sec. 16, Immigration Act of Feb. 5, 1917, c. 29, 39 Stat. 885; sec. 152, title S. U.S.C.). Three of the statutes just cited impose an increased penalty when a deadly or dangerous weapon is used in resisting the officer or employee.

The need for general legislation of the same character, for the protection of Federal officers and employees other than those specifically embraced in the statutes above cited, becomes increasingly apparent every day. The Federal Government should not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel; and Congress has recognized this fact at least to the extent indicated by the special acts above cited. This Department has found need for similar legislation for the adequate protection of the special agents of its division of investigation, several of whom have been assaulted in the course of a year, while in the performance of their official duties.

In these cases resort must usually be had to the local police court, which affords but little relief to us, under the circumstances, in our effort to further the legitimate purposes of the Federal Government. It would seem to be preferable, however, instead of further extending the piecemeal legislation now on the statute books, to enact a broad general statute to embrace all proper cases, both within and outside the scope of existing legislation. Other cases in point are assaults on letter carriers, to cover which the Post Office Department has for several years past sought legislation; and the serious wounding, a couple of years ago, of the warden of the Federal Penitentiary at Leavenworth by escaped convicts outside the

Federal jurisdiction. In the latter case it was possible to punish the escaped convicts under Federal law for their escape; but they could not be punished under any Federal law for the shooting of the warden.

I have the honor, therefore, to enclose herewith a copy of S. 3184, which was introduced at the request of this Department in the Seventy-second Congress and to urge its reintroduction in the present Congress; and to express the hope that it may receive the prompt and serious consideration of your committee.

Respectfully,

HOMER CUMMINGS,
Attorney General.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V 69 CR. 58

FRANK HASIMAR AND

GENE HASIMAR, DEFENDANTS

MEMORANDUM

BONSAL, D. J.

A Grand Jury indictment charges that on or about January 10, 1969 the defendants assaulted three Special Agents of the Bureau of Narcotics and Dangerous Drugs while they were engaged in the performance of their official duties. The indictment is based on Title 18, United States Code, §§ 111 and 1114. Section 111 makes it a crime to assault any person *designated* in § 1114 while engaged in the performance of his official duties. Section 1114 designates various officers and employees of the United States.

Reorganization Plan No. 1 of 1968 (28 U.S.C.A. § 309), which became effective on April 8, 1968, established in the Department of Justice a new bureau, the Bureau of Narcotics and Dangerous Drugs, and transferred to it the functions previously carried on by the Bureau of Narcotics in the Treasury Department, and by the Bureau of Drug Abuse Control in the Department of Health, Education and Welfare. Section 4 of the Reorganization Plan abolished the Bureau of Narcotics in the Department of the Treasury.

Defendants move to dismiss the indictment on the ground that on the date of the alleged assault Special Agents of the Bureau of Narcotics and Dangerous Drugs were not designated officers or employees under § 1114 and therefore § 111 does not apply. Defendants therefore take the position that the alleged assault, even if it occurred, was not a crime under § 111.

The government conceded at argument that the Agents named in the indictment had been Agents of the old Bureau of Narcotics and not designees of the Secretary of H.E.W. in the old Bureau of Drug Abuse Control. The government

contends, however, that the Reorganization Plan was merely a merger within the Department of Justice of functions previously carried on in the Treasury Department and in H.E.W., and that it was the intention of Congress to afford the same protection to the Agents of the new Bureau that they had previously enjoyed.

Section 111, being a criminal statute, must be strictly construed, *United States* v. *Resnick*, 299 U.S. 207 (1936). Strictly construed, § 111 applies only to Federal officers designated in § 1114. Turning to § 1114, the only applicable provision is "any officer or employee . . . of the Bureau of Narcotics." At the time of the assault alleged in the indictment, the Bureau of Narcotics had been abolished.

While the Congress undoubtedly intended to have the provisions of § 1114 apply to officers and employees of the newly created Bureau of Narcotics and Dangerous Drugs, it failed to do so. Therefore, at the time of the alleged assault, the Agents were not designated employees under § 1114, and the indictment does not state a crime under § 111.

Accordingly, the defendants' motion to dismiss the indictment is reluctantly granted. It is hoped that the government will take a prompt appeal, and, perhaps more importantly, that the Congress will take prompt action to amend § 1114 to specifically designate officers and employees of the Bureau of Narcotics and Dangerous Drugs.

Settle order.

SIGNED: DUDLEY B. BONSAL
U.S.D.J.

DATED: New York, N.Y.
May 25, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-567

JOSEPH EDWIN PEEL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-593

RICHARD NEIL MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that an indictment charging assault on an officer of the Drug Enforcement Administration was insufficient to state a crime under 18 U.S.C. 111 and 1114, since these statutes refer only to officers of the Bureau of Narcotics and Dangerous Drugs, the predecessor of the Drug Enforcement Administration.

In August 1973, petitioners moved to dismiss an indictment in the United States District Court for the Southern District of Texas charging them with assault on an officer

of the Drug Enforcement Administration. The district court granted the motions on the grounds that 18 U.S.C. 1114 does not specifically mention the Drug Enforcement Administration and does not include successor agencies to those specified and that, therefore, the indictment failed to charge an offense (Pet. App. A1-A4). The court of appeals reversed (Pet. App. A6-A14; 497 F.2d 1369).

Petitioners contend that the indictment charging assault of an officer of the Drug Enforcement Administration does not charge an offense under 18 U.S.C. 111 and 1114, which proscribe the assault of an officer of the Bureau of Narcotics and Dangerous Drugs, the predecessor of the Drug Enforcement Administration, because: (a) the statutes must be strictly construed; (b) neither the language of the statutes nor their legislative history supports the construction by the court below; (c) the savings statute (5 U.S.C. 907(a)) is not applicable; and (d) the statutes as construed below violate the petitioners' right to due process and constitute *ex post facto* laws.

There are no constitutional impediments to the court of appeals' construction of Sections 111 and 1114, and 5 U.S.C. 907(a). As the court below noted, the concept of strict construction does not require that the savings statute 5 U.S.C. 907(a)) be disregarded where, as here, petitioners could not "validly" argue that they "were not given adequate notice of the prohibited conduct, that is, the assault of a federal officer" (Pet. App. A12; 497 F.2d at 1373). The courts of appeal have uniformly recognized that in prosecutions under 18 U.S.C. 111, the government is not required to prove that the defendant knew that the victim of the assault was a federal officer. See *United States* v. *Perkins,* 488

F.2d 652 (C.A. 1);[1] *United States* v. *Ulan*, 421 F.2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F.2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F.2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F.2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F.2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Ganter*, 436 F.2d 364 (C.A. 7); *United States* v. *Leach*, 429 F.2d 956 (C.A. 8) (dictum), certiorari denied, 402 U.S. 986; *United States* v. *Kartman*, 417 F.2d 893 (C.A. 9). Moreover, as the court below noted, "[It is certainly not an element of a section 111 offense that the defendant know the specific name of the agency by which his victim is employed" (Pet. App. A-12; 497 at F. 2d 1373).

Petitioners' remaining contentions were properly rejected by the court of appeals. We rely upon the following portion of its opinion (Pet. App. A9-A11; 497 F.2d at 1371-1372):

> The district court's memorandum and order concluding that the indictment should be dismissed omits reference to 5 U.S.C. § 907(a), enacted September 6, 1966. Section 907 (a), which provides for continuity of status and function in connection with executive reorganizations, controls the issues presented. * * *

---

[1]Since petitioners were charged solely with the substantive offense of assaulting a federal officer, there is no reason to defer disposition here because of the issue pending decision in *United States* v. *Feola*, certiorari granted, No. 73-1123, April 15, 1974: whether in a prosecution for a conspiracy to violate a federal law it is necessary to prove the defendant's knowledge of a jurisdictional element when such knowledge need not be shown in a prosecution for the underlying substantive offense.

* * * * *

The section's legislative history reflects the clear meaning of the statutory language, that is, the desire of Congress not to leave a hiatus in existing law when a reorganization has taken place. A House Report on the 1949 Reorganization Act, the predecessor of the 1966 reorganization statute, explains that section 907 "contains saving provisions with respect to the status, after a reorganization, of statutory provisions, regulations, and other actions, and suits and other proceedings, having a relation to any agency or function affected by such reorganization." H.R. Rep. No. 23, 82nd Cong., 1st Sess., 1949 U.S. Code Cong. Serv. 1391. In addition, a House Report commenting on a similar saving clause in the original Reorganization Act of 1939 noted that the saving clause "provides for the survival of . . . laws in connection with reorganization." H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1939)

Basically, when a reorganization takes place, section 907(a) continues in effect laws existing prior to the reorganization. Any statute relating to an agency and enacted before the effective date of the reorganization of that agency has the same effect as if there had been no reorganization. Thus, special agents of the Drug Enforcement Administration fall within the ambit of section 111, by virtue of the provisions of section 1114, in the same manner as did the special agents of the Bureau of Narcotics and Dangerous Drugs.

On appeal, defendants pose four basic arguments as militating against the application of section 907(a) to their situation. First, they assert that Congress has at times amended 18 U.S.C. § 1114 to reflect changes caused by reorganizations. They refer specifically to the amendment by Congress, as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of section 1114 to substitute the Bureau of Narcotics and Dangerous Drugs in the Department of Justice for its predecessor, the Bureau of Narcotics in the Treasury Department, 1970 U.S. Code Cong. & Admin. News 1492, § 701(i)(1), Pub.L. 91-513, 84 Stat. 1236. We do not view this as evidence of congressional intent that an amendment of 18 U.S.C. § 1114 was a precondition to the coverage of agents of the Bureau of Narcotics and Dangerous Drugs, to the disregard of 5 U.S.C. § 907(a). No such implication can be garnered from the legislative history of the Act. The provision amending section 1114 was merely one provision of a general statutory program designed to deal with drug abuse; and the amendment came almost two years after the creation of the Bureau of Narcotics and Dangerous Drugs, *see* Reorganization Plan No. 1 of 1968, 1968 U.S. Code Cong. & Admin. News 4734. The hearings on the creation of the Bureau of Narcotics and Dangerous Drugs moreover indicate that amendment of section 1114 was not deemed necessary to the continued coverage of that Bureau's officers. *See* Hearings Before a House Subcomm. on Government Operations, 90th Cong., 2d Sess., at 64 (1968). Indeed, it would ignore the impact of 5 U.S.C. § 907(a) to hold that because Congress

has on previous occasions made a conforming amendment to section 1114 it must do so to protect federal agents in reorganization situations. [Footnotes omitted.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[2]On October 26, 1974—after the court of appeals' decision in this case—Congress amended 18 U.S.C. 1114 to reflect the reorganization transferring the functions of the Bureau of Narcotics and Dangerous Drugs . to the Drug Enforcement Administration (P.L. 93-481, Section 5, 88 Stat. 1456). This amendment does not indicate that Congress believed that Drug Enforcement Administration agents were not previously entitled to the protection of 18 U.S.C. 1114.

Although the legislative history does not indicate Congress' reason for amending Section 114 (S. Rep. No. 93-925, 93d Cong., 2d Sess.), since the reorganization of the Drug Enforcement Administration and the Bureau of Narcotics and Dangerous Drugs had been accomplished on July 10, 1973 (38 Fed. Reg. 18380) the amending of Section 1114 on October 26, 1974, was a housekeeping provision to conform the language of Section 1114 to the accomplished reorganization. Moreover, as the court below noted, in a prior reorganization involving the Bureau of Narcotics and Dangerous Drugs, it was not deemed necessary to amend Section 1114 to conform to the planned reorganization.